85-1418

No.

Supreme Court, U.S.
FILED
FEB 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

NATIONWIDE MUTUAL INSURANCE COMPANY, a corporation,

*Appellant,*

*vs.*

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN BERNARDINO,

*Appellee.*

---

MARY DENISE MITCHELL, LEON MITCHELL,

*Real Parties in Interest.*

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ON APPEAL FROM
CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO

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# JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Is it repugnant to the 14th Amendment for a state to enact a statute imposing tort and punitive damage liability on a liability insurer and in favor of a third party claimant for providing the insured a defense in an adversary proceeding and failing to settle in advance of trial?

(a) Can a statute impose tort and punitive damage liability for refusing to waive the constitutional right to notice of hearing, hearing, and judgment prior to being deprived of property and exercising the fundamental right to access to the courtroom to defend yourself?

(b) California Insurance Code §790.03(h)(5) imposes third party liability on the insurer not for improper actions taken in the defense of a suit by the third party against the insured, or

for damages incurred by the insured, but for the basic act of defending the suit at all, i.e., exercising the right to notice of hearing, hearing and proper order before being dispossessed of property; does this statute's imposition of an extreme penalty (tort and punitive damages) to deter the right to access to the courtroom comply with the requirements of due process guaranteed by the 14th Amendment?

2. Does a statute imposing tort and punitive damage liability for defending a lawsuit on only insurers and no other defendant in any civil proceeding violate the equal protection clause of the 14th Amendment? California does not permit a cause of action for malicious defense; said statute excepts only insurers and no other litigant from that rule and imposes tort liability not for acting maliciously, but on the lesser standard of unreasonably

defending a lawsuit brought by a third party adversary against the insured to whom there is a separate obligation to provide a defense.

3. Does a statute imposing tort and punitive damage liability on the attorney defending a personal injury suit for conspiring with his client not to settle said suit (and making appellant liable therefore) violate the due process clause of the 14th Amendment? The right to counsel in a civil proceeding at one's own expense is a California state constitutional right. Attorneys representing insured defendants in civil suits must temper their representation because they are subject to tort liability for conspiring with their clients to violate Insurance Code §790.03(h)(5), thus chilling the representation and depriving the insured of the effective assistance of counsel.

4. Does a statute imposing tort and punitive damage liability for conspiring not to settle a lawsuit only on attorneys defending insured defendants, and insurers, but no other attorneys violate the equal protection clause of the 14th Amendment? Only attorneys representing insured defendants and insurers, and no other defense attorneys, are subject to tort liability for conspiring with a client not to settle a case whereby the client would have to pay money.

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## JURISDICTIONAL STATEMENT

Pursuant to Rules 12 and 15 of the Rules of Supreme Court of the United States, appellant Nationwide Mutual Insurance Company files this statement on the basis upon which it contends that the Supreme Court of the United States has jurisdiction to review the judgment entered by the California Court of Appeal, Fourth Appellate District, Division Two in this case and should exercise such jurisdiction herein.

## OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two is included herein as Appendix A. The order of the California Supreme Court denying appellant's Petition for Review is included herein as Appendix B. Appellant petitioned the California

Court of Appeal and later sought review in the California Supreme Court pursuant to California Code of Civil Procedure §437c, subparagraph (l), authorizing review of orders on summary judgment motions by prerogative writ rather than by appeal. A ground of the writ was the unconstitutionality under the 14th Amendment to the United States Constitution of California Insurance Code §790.03(h)(5) which provides that a third party claimant and adversary party may sue a liability insurer in tort and for punitive damages for not settling the lawsuit brought by said claimant against the insured. The judgment constitutes a ruling on the merits. The California Supreme Court denied review on 13 November 1985. There is no trial court opinion.

## JURISDICTION

The appeal herein is from a final judgment of the California Court of Appeal upholding the constitutional validity of California Insurance Code §790.03(h)(5). The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 U.S.C. §1257(2).

The judgment was made and filed 26 September 1985. Review by the California Supreme Court was denied 13 November 1985. Notice of Appeal was filed on 23 January 1986. The Notice of Appeal is included herein as Appendix C.

## STATUTES INVOLVED

California Insurance Code §790.03(h)(5) provides:

> "The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.
>
> ". . .

> "Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:
>
> ". . .
>
> "(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear."

Said statute has been definitively interpreted by the California Supreme Court in Royal Globe Ins. Co. v. Superior Court, 23 C.3d 880, 153 C.R. 842, 592 P.2d 329 (1979). As interpreted by Royal Globe, id., Insurance Code §790.03(h)(5) provides a cause of action in favor of a third party claimant who is the plaintiff in a personal injury lawsuit against the liability insurer of the defendant in said personal injury lawsuit, for failing to settle said suit. Simply put, the plaintiff can obtain a judgment or a settlement within policy limits against an insured

defendant and then file a separate suit against the liability insurer in tort for tort and punitive damages for failing to settle the first suit. This cause of action is solely a creature of statute; as interpreted by the California Supreme Court, no such action lies in favor of a stranger to the insurance contract at common law, but only by reason of statute. (Royal Globe, id.; Murphy v. Allstate Ins. Co., 17 C.3d 937, 132 C.R. 424, 553 P.2d 584 (1976).) This statutory cause of action is permitted in diversity actions. (Pray v. Foremost Ins. Co., 767 F.2d 1329 (C.A. 9, 1985).)

## STATEMENT OF THE CASE

Appellant was the liability insurer for Paul Clement Wilson. Real party Mary Denise Mitchell was the driver of an automobile owned by her father, real

party Leon Mitchell.[1/] On 27 June 1981, Mitchell and Wilson were involved in an automobile accident. Mitchell suffered personal injuries.

The Mitchells made demand on appellant for policy limits. When no settlement offer was made, at the end of 1981, suit was filed against Wilson, the insured. In approximately January, 1982, Egan, Harrison & Bawden, attorneys at law, by Charles A. Harrison, Esq., were retained by appellant to defend the insured in the lawsuit. The Mitchells, contending that liability for the automobile accident was clear, demanded either policy limits of $250,000.00 or $200,000.00 from commencement of suit up to the settlement conference on the eve of trial. Wilson's defense conducted discovery, developed a potential defense to

1/ When used in the singular, "Mitchell" refers to Mary Mitchell, the driver involved in the automobile accident.

liability and the defense of comparative liability.

At the settlement conference on 26 April 1983 the case settled for $200,000.00. A settlement and release was executed by the Mitchells which expressly acknowledged that Wilson's "legal liability and damages are disputed and denied"; there is no admission of liability in the settlement.[2/]

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2/ Summary judgment was brought largely on the allegations of the Complaint. Although evidence below indicated that there was a possible defense, and liability was not "reasonably clear," for purposes of this Statement we assume that the circumstances are sufficient to sustain the technicalities of the state cause of action that although the insured's "liability" was reasonably clear to the insurer, the insurer, by itself and in conjunction with its attorney, failed to attempt to settle with the plaintiff. The issue is the constitutionality of the statutory imposition of tort and punitive damage liability. Therefore we do not attempt by this factual summary to demonstrate the incorrectness of Mitchell's version of the facts other than the admitted settlement expressly disputing and denying liability. The standard

[footnote continued]

After completion of the settlement, the Mitchells turned around and on 6 June 1984 filed an action in appellee Superior Court for tort and punitive damages for violation of Insurance Code §790.03(h). The claim is for violation of statutory

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that liability is reasonably clear is clearly inadequate. California is a comparative liability state. (Li v. Yellow Cab Co., 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226 (1975).) Assuming the insured's liability is clear, there still must be a determination of the plaintiff's negligence, the percentages of liability and the amount of damages. Defendant and its insurer were entitled to notice, hearing and order on those issues too. If a defendant believes he is liable, he is still entitled to a determination of the amount by appropriate hearing and order. It is next to impossible in an automobile personal injury suit with disputed facts for both 100% of the liability and a liquidated amount of damages to be objectively clear. The evidence below also shows that the amount and percentage of liability were in dispute in the Mitchell v. Wilson suit. That there was a substantial issue of the amount of comparative liability is clearly inferable by the fact that although there were $100,000 in medical damages, the case nevertheless settled for $200,000, which was $50,000 under the limit of liability of Wilson's policy.

duties owed directly to appellees, the adversaries in the first suit, and not for any failure of performance to Wilson, the insured.

Through various pre-trial motions, all causes of action other than Insurance Code §790.03(h)(5) were disposed of. Only Insurance Code §790.03(h)(5) liability to a third party claimant is at issue in the trial court.

The instant lawsuit is also against Christopher Keller, a claim representative of appellant, and Egan, Harrison & Bawden and Charles A. Harrison, the attorneys hired to defend Wilson in the Mitchell v. Wilson lawsuit. Their liability is also predicated on the breach of the statute under constitutional attack herein.[3/]

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3/ None of the other defendants has appeared in the Superior Court suit.

[footnote continued]

Appellant filed a Motion for Summary Judgment in appellee Superior Court. Said motion was denied.

Appellant then filed a Petition for Writ of Mandate in the California Court of Appeal. Pursuant to specific statutory provisions in California equivalent to Rule 56, F.R.Civ.P., proceedings on summary judgment motions which do not result in a judgment are not appealable, but instead are specifically made subject to review by prerogative writ. (California Code of

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Also they were not parties at all to the writ proceedings from which appeal is taken; it is considered an original proceeding in the California Appellate Court and they are not parties to this appeal. Since appellant is charged with either respondeat superior or conspiracy liability for the acts of the other Superior Court defendants which violate §790.03(h)(5), their liability is also raised herein to destroy vicarious liability contentions.

Civil Procedure §437c, subparagraph (1).)[4/]

Even though State Supreme Courts do not like to have attorneys present arguments that, in effect, the court itself created an unconstitutional cause of action,[5/] appellant raised state and federal constitutional questions and also contended that a

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4/ The Superior Court is a party and satisfies U.S.S.C. Rule 28(c). Mary Denise and Leon Mitchell are the only other parties.

5/ As a statement of the California rules of statutory interpretation, in our opinion Royal Globe leaves much to be desired. It makes more sense as a deliberate misreading of the statutes in order to advance the common law. As a decision imposing new common law liability it merits serious consideration. Nevertheless, California faithfully follows the distinction between common law and statutory liability. Liability to third party claimants is permitted only pursuant to statute and not at common law. Murphy v. Allstate, supra, remains the law regarding the cause of action for breach of the implied covenant of good faith and fair dealing; liability to a third party claimant pursuant to Royal Globe, supra, is applicable only for a statutory action. Hence this appeal rather than a Petition for Certiorari.

determination or admission of the insured's liability is a prerequisite to a Royal Globe action by a third party claimant for breach of a liability insurer's obligations under Insurance Code §790.03(h)(5). (E.g., a liability insurer has no obligation to pay a third party claimant if, in fact, the insured is not liable (Sych v. Insurance Co. of North America, 173 C.A.3d 32, __ C.R. __ (1985): in this case the plaintiffs settled and dismissed the insured and now attempt to prove the insured's liability in the suit with the insurer.) The statutory interpretation contention was not accepted. Appellant specifically argued in the California Court of Appeal and in the Supreme Court that Insurance Code §790.03(h)(5)'s authorization of a suit by a third party claimant against the defendant's insurer and attorney violated the due process and equal protection

clauses of the 14th Amendment. (Petition for Writ of Mandate, page 16; Petition for Review, pages 15-16.)

The Court of Appeal denied the Petition for Writ of Mandate. Instead of a discretionary denial, it cited case authority on a point of substantive law, so out of necessity considered constitutional issues. The California Supreme Court denied discretionary review without comment.

FEDERAL QUESTIONS ARE SUBSTANTIAL

1. It goes to the very heart of an adversary system for a party to be involuntarily haled into court and then have tort and punitive damages liability imposed for refusing to voluntarily give up the defense and pay money. The decisions of this Court consistently hold that a fundamental principle of due process of law is that a person cannot be deprived of property without notice of hearing,

hearing before impartial judge and jury, and judgment.[6/] The analytical and philosophical results of the statute under review is to impose tort and punitive damage liability for declining to waive the federal constitutional right to due process of law. In defense of the original lawsuit of Mitchell v. Wilson, appellant had the right not to be deprived of its property (money) without notice of hearing, hearing and appropriate judgment. A settlement is a voluntary relinquishment of those rights. A state by statute cannot impose tort and punitive damage liability for the act

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6/ There obviously are exceptions and other nomenclature which may be used. Common examples are: Ex Parte attachments or temporary injunctions for short periods of time when there is good cause; hearings may have a judge, jury, arbitrator, or some other person as a trier of fact or legal officer; there may be orders short of or called something different than a judgment. The use of the terms hearing, trial, judge, jury, judgment, etc. are not meant to be exclusive, but rather illustrative.

of refusing to waive federal constitutional rights. The state cannot bar the defendant from the courtroom.

In the original lawsuit of Mitchell v. Wilson, it is settled and determined that where a person has a property interest, said person cannot be deprived of that property interest without notice and opportunity to be heard. (Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 82 S.Ct. 1820, 23 L.Ed.2d 349 (1969); Parratt v. Taylor, 451 U.S. 526, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. __ 106 S.Ct. ___, 84 L.Ed.2d 494 (1985).) The principle advanced by the statute under review

would, for example, impose liability on the debtors in Fuentes, supra, and Sniadach, supra, for insisting on their constitutional right to hearing. Until such time as said hearing is held, appellant was entitled to retain its money. The use of money until culmination of the suit is a protected property right. (Sniadach, supra, 395 U.S. at 342 (concurring opinion of Harlan, J.); Fuentes, supra, 407 U.S. at 86.)

The effect of §790.03(h)(5) is to impose tort and punitive damage liability for refusing to give up the right to a trial determining liability and the amount thereof, and the formal order imposing that liability. Section 790.03(h)(5) imposes tort and punitive damage liability when, to use the instant example, the alleged automobile driver-tortfeasor's liability becomes reasonably clear to the person obligated to pay for the tortfeasor's

damages. So what if liability is subjectively reasonably clear to the tortfeasor or the insurer? The defense still has the constitutional right to a jury determination of that liability and the amount thereof. So what if the tortfeasor or the insurer believes the amount the jury would award? They have a constitutional right to a jury's determination of that amount and are not required to rely on their own subjective determination or a plaintiff's demand based on a guess as to what a jury would do. So what if an insurer retains money and the use of the money until a proper order is entered? In our country a defendant in a lawsuit is entitled to keep his money until there is a proper order depriving him of it vis-a-vis the claims of a stranger to the contractual obligation.

That is not to say that abuses do not occur or that a state may not enact remedies short of a final judgment in an underlying

automobile accident case. Nor does appellant contend that sanctions may not be imposed on a defendant for specific acts of misconduct in the defense of a lawsuit. In the early part of this century this Court upheld the imposition of sanctions against insurers for the bad faith defense of a lawsuit with the insured, or where needed to make the insured whole. (Life & Casualty Co. v. McCray, 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987 (1934); Fraternal Mystic Circle v. Snyder, 227 U.S. 497, 33 S.Ct. 292, 57 L.Ed. 611 (1913).) In doing so, however, this Court emphasized that these were penalties for failure to comply with the contract in a suit with the person to whom the contractual obligation was owed; the amount is moderate; the insurer is not penalized for taking the matter to court; "The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant

to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open." (Life & Casualty, supra, 291 U.S. at 574-575.) This statute involves the refusal to settle - i.e., compromise - not with the insured to whom there is a contractual obligation, but an ordinary third party adversary. The sum involved is standardless, ambiguous and unliquidated and involves compensation for such intangible non-economic damages as pain and suffering and emotional distress;[7/]

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7/ The California Supreme Court has long recognized the reality of the shortcomings of the law of negligence as the means of compensating automobile accident victims (Maloney v. Rath, 69 C.2d 442, 445-446, 71 C.R. 897, 445 P.2d 513 (1968)) and that pain and suffering damages are subjective, arbitrary, without true standard, which can be translated into monetary loss only with great difficulty (Capeluto v. Kaiser Foundation Hospitals, 7 C.3d 889, 893, 103 C.R. 856, 500 P.2d 880 (1972), citing Seffert v. Los Angeles Transit Lines, 56 C.2d 498, 511-512, 15 C.R. 161, 364 P.2d 337 (1961) (dissenting opinion of Traynor,

[footnote continued]

and it is compounded by punitive damages and comparative negligence principles. The effect of punitive damages on a first party bad faith claim is apparently already before this Court. (Aetna Life Ins. Co. v. Lavoie, USSC No. 84-1601.) General concerns with punitive damages have been expressed by the Court and some of its members. (Electrical Workers v. Foust, 442 U.S. 42, 50-51, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979); Smith v. Wade, 461 U.S. 30, 59, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (Rehnquist, J., dissenting); Dun & Bradstreet, Inc. v. Greenmoss

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J.) and McCormick, Damages (1935) §88, pp. 318-319.) While the court elects to defer to the legislature, the present court ignores the counsel of one of its greatest members and punishes insurers with tort and punitive damages for failing to liquidate by settlement a subjective, arbitrary damage determinable only with great difficulty. Since a factor regarding the amount of punitive damages is its relation to the amount of compensatory damages, the house of cards is evident.

Builders, Inc., __ U.S. __, __, 105 S.Ct. 2939, __ L.Ed.2d __ (1985) (Brennan, J. dissenting).) Tort and punitive damages for refusing to settle an unliquidated claim by a third party by relinquishing the right to notice of hearing, hearing and appropriate order is the essence of an unfair barrier to access to the courts. The Constitution does not permit a state to enact a statute making tortious and penalizing the basic act of defending the lawsuit and putting a plaintiff to his proof. Insisting on the constitutional rights of notice of hearing, trial and judgment and refusing to waive those rights cannot form the basis for arbitrary, standardless tort and punitive damage liability.

> "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the . . . right to continued possession and use of goods." (Fuentes, supra, 407 U.S. at 87.)

A statute imposing liability for exercise of the right to due process conferred by the 14th Amendment clearly fails constitutional scrutiny.[8/] It goes to the very heart of the concept of due process; it makes tortious the exercise of the constitutional right to due process of law.[9/]

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8/ It has been suggested that what the state is really doing is converting liability insurance into first party coverage for the plaintiff with tort damages as the measure of indemnity. Even strict products liability cases have not gone this far. No such rationale has in fact been advanced. It comes perilously close to an appropriation of an insurer's assets without just compensation rather than the regulation of the business of insurance which Insurance Code §790.03 purports to do.

9/ The trial in the action for breach of statutory obligations does not satisfy the requirements of due process. The original lawsuit is against the insured, the insured owes an obligation to cooperate with the insurer, and the fact of insurance is not disclosed to the jury. In the suit for breach of statutory obligations, the liability of the insured is tried when the insured no longer owes an obligation to cooperate with the insurer, and when the suit is against an insurance company as the named defendant.

Waivers of constitutional rights are disfavored and this case does not meet the standards therefor. (E.g., Fuentes, supra, 407 U.S. at 95. If the contention is that states can condition doing business therein on an advance waiver of the 14th Amendement we will respond thereto in a brief on the merits.)

2. Insurance Code §790.03(h)(5) also violates the equal protection clause. California does not now and for over 100 years has not permitted a cause of action for malicious defense. (Bertero v. National General Corp., 13 C.3d 43, 52, 118 C.R. 184, 529 P.2d 608 (1974); Eastin v. Bank of Stockton, 66 C. 123, 4 P. 1106 (1884).) As stated in Bertero, supra, the doctrine of no malicious defense protects the right of a defendant involuntarily haled into court to conduct a vigorous defense. Insurance Code §790.03(h)(5)

singles out liability insurers [10/] as the sole litigant in California excepted from that rule. What is more the defense does not have to be "malicious," only unreasonable. Whatever the basis for singling out insurers in general as incurring tort liability for breach of contract, there is no rational basis for singling out liability insurers when engaged in the task of providing a defense to the insured in an adversary proceeding. There is no basis for saying by statute that although defendants may defend a lawsuit, those defendants with liability insurance may not on pain of tort and punitive damages liability.

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10/ More than insurers are covered by the section, although the exact extent is not yet clear. The uncertainty of the law regarding persons other than insurers is demonstrated by the less than satisfactory authority which allows the Mitchells to sue Keller at all. (Reasoner v. Aetna Life Ins. Co., 600 F.Supp. 278 (S.D. Cal., 1984).)

3. In California, the right to counsel in a civil proceeding at the litigant's expense is a constitutionally protected right. (In Re Kathy P., 25 C.3d 91, 102, 157 C.R. 874, 599 P.2d 65 (1979); Brooks v. Small Claims Court, 8 C.3d 661, 105 C.R. 785, 504 P.2d 1249 (1973); Mendoza v. Small Claims Court, 49 C.2d 668, 321 P.2d 9 (1958).) California holds, however, that the attorney who defended the insured in the underlying lawsuit may be sued for conspiring with the insurer to violate Insurance Code §790.03(h)(5). (Wolfrich Corp. v. United Service Automobile Assn., 149 C.A.3d 1206, 197 C.R. 446 (1983).) Accordingly, we see what has occurred in this suit: Plaintiffs' attorneys settle the lawsuit, take the money, and then turn around and sue the attorneys who defended the suit for failing to settle it! What is particularly obnoxious is not only does defense

counsel have ethical and legal obligations in defense of the lawsuit, but the insurer has duties to provide a defense which are more extensive than the obligation to indemnify. This court need not rule on the right to an attorney in a civil action; California has done that as a state right. Having given that right to appear by counsel, the state cannot pass a statute so chilling that right by making the defense counsel defend under the threat of legal action by the adversary for providing a vigorous defense. We are going backwards towards the medieval days when jurors were thrown in jail if the judge did not like their verdict. A statute placing defense counsel on the chopping block of tort liability for defending the case strikes at the heart of our adversary system.

4. Nowhere else in California law is the attorney defending a lawsuit liable

in tort because his client does not settle. As pointed out hereinabove, §790.03(h)(5) makes insurers and no other defendant liable in tort for refusing to settle although the tort of malicious defense is not recognized. Needless to say attorneys defending an insured litigant are the only attorneys threatened with tort liability for refusing to settle. Insureds and insurers are singled out and relegated to having lesser legal representation than other litigants by a statute making only their attorneys subject to suit. This legislative discrimination against effective representation is repugnant to the equal protection clause of the 14th Amendment.

## CONCLUSION

California Insurance Code §790.03(h)(5), as interpreted by Royal Globe, supra, is a major redefinition of settled and determined concepts of due process of law.

By statute, California has made it tortious for there to be a vigorous defense of an alleged tortfeasor involuntarily haled into court because he happens to be insured.[11/]

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11/ Unfortunately, California's campaign against insurers blazes new trails even as we write this Jurisdictional Statement. Insurance Code §790.03(h)(5) now includes settlement negotiations and conduct in this very lawsuit! (White v. Western Title Insurance Company, 40 C.3d 870, __ C.R. __, __ P.2d __ (1985).) No other party to a lawsuit has this unique liability, not to mention the state's attempt to subvert Rule 408, Federal Rules of Evidence, in every diversity case involving an insurer. California is putting so many tort penalties on insurers for seeking its day in court and exercising the right to due process of law, that it becomes clear that, as intepreted by the California Supreme Court, §790.03(h)(5) is a statutory attempt to prevent an insurer from defending a lawsuit for its insured and for itself. In White, supra, Justice Lucas (a former Federal District Judge) in dissent, concluded that California was discriminating against insurers and depriving them of due process by depriving them of the ability to fairly defend a lawsuit. Appellant's constitutional attack is not coming from left field, but is part of a growing recognition of the unfairness of the California decisions. "A crisis now affairs are coming to." The basic and fundamental ability to defend yourself in a court of law is at risk in California.

In Smith v. Wade, supra, one of the points raised by the Court was that petitioner's argument presented no good reason to depart from common law rules. 12/ (46 U.S. at 55.) The imposition of tort and punitive damages liability on the liability insurer and the attorney for the basic act of a defendant involuntarily haled into court of defending himself and availing himself of due process rights guaranteed by the Constitution is sufficient and good reason to merit plenary consideration by this Court. If a purpose of tort and punitive damages is to deter certain conduct, when that conduct is protected by the Constitution the Court

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12/ We refrain from briefing in this Statement the common law rules regarding punitive damages. After Smith v. Wade, supra, it is like bringing coals to Newcastle; the Court is sufficiently familiar with those principles that such an exercise may be deferred to the briefing on the merits.

is confronted with the question of how far the state may go in enacting a statute to deter the exercise of a basic constitutionally protected right. This startling and unique deviation from fundamental principles must not be allowed to gain a foothold. It represents a substantial and important federal question requiring resolution.

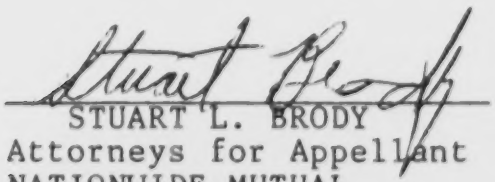
DATED: 27 January 1986.

Respectfully submitted,

STUART L. BRODY

SIMON, BUCKNER, HAILE & MIGDAL

PARKER, STANBURY, McGEE, BABCOCK & COMBS

By 
STUART L. BRODY
Attorneys for Appellant
NATIONWIDE MUTUAL
INSURANCE COMPANY

# APPENDIX A

COURT OF APPEAL --- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| NATIONWIDE MUTUAL INSURANCE COMPANY<br><br>Petitioner,<br><br>v.<br><br>SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN BERNARDINO,<br><br>Respondent.<br><br>MARY DENISE MITCHELL, LEON MITCHELL,<br><br>Real Party in Interest. | E 002386<br>COUNTY NO. 223137<br><br>FILED<br><br>Keenan G. Casady, Clerk<br><br>Sept. 26 1985<br><br>COURT OF APPEAL FOURTH DISTRICT |

THE COURT:

The petition for writ of mandate is DENIED. (Rodriguez v. Fireman's Fund Ins. Co., 146 Cal.App.3d 46, 54.)

McDANIEL, J.
Acting P.J.

APPENDIX A

# APPENDIX B

O R D E R  D E N Y I N G  R E V I E W

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 2, No. E002386

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

I N  B A N K

---

NATIONWIDE MUTUAL INSURANCE COMPANY, etc., Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF SAN BERNARDINO, Respondent;

MITCHELL, et al., Real Parties in Interest.

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Petition for review DENIED.

Bird /s/
Chief Justice

SUPREME COURT
FILE
Nov. 13 1985
Laurence P. Gill, Clerk

J. Rogers /s/
Deputy

APPENDIX B

# APPENDIX C

IN THE COURT OF APPEAL

FOURTH APPELLATE DISTRICT,

DIVISION TWO

| | | |
|---|---|---|
| NATIONWIDE MUTUAL INSURANCE COMPANY, a corporation, | ) | 4th Civil No. E002386 |
| Appellant, | ) | RECEIVED |
| vs. | ) | 23 Jan. 1986 |
| SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN BERNARDINO, | ) | COURT OF APPEAL |
| | ) | FOURTH DISTRICT |
| Respondent. | ) | |
| MARY DENISE MITCHELL, LEON MITCHELL, | ) | |
| Real Parties In Interest.) | ) | |

Notice is hereby given that Nationwide Mutual Insurance Company, the petitioner above named, hereby appeals to the Supreme Court of the United States from the final judgment of the California Court

of Appeal, Fourth Appellate District, Division Two, denying the Petition for Writ of Mandate entered in this action on 26 September 1985.

This appeal is taken pursuant to Title 28, U.S.C., §1257, subparagraph (2).

DATED: 15 January 1986.

SIMON, BUCKNER, HAILE & MIGDAL

STUART L. BRODY

By /s/
STUART L. BRODY
Attorneys for Appellant NATIONWIDE MUTUAL INSURANCE COMPANY